No. 90-360

In The

Supreme Court of the United States

October Term, 1990

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC.

Petitioner,

v.

PUBLIC CITIZEN, *et al.*

Respondents.

On Petition For A Writ Of Certiorari
To The District Of Columbia Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the court of appeals correct in concluding that the Nuclear Regulatory Commission's decision not to impose binding training requirements for nuclear power-plant personnel violated § 306 of the Nuclear Waste Policy Act of 1982, which directs the agency to "establish . . . instructional requirements"?

2. Was the court of appeals correct in concluding that the Nuclear Regulatory Commission's decision to make permanent its two year trial policy of implementing § 306 by deferring to an industry training program, instead of issuing binding requirements, was subject to judicial review?

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MEMORANDUM FOR THE PUBLIC CITIZEN RESPONDENTS IN OPPOSITION

Respondents Public Citizen, Nuclear Energy Information Service, Center for Nuclear Responsibility, Del-Aware Unlimited, Inc., Three Mile Island Alert, Coalition for the Environment, and Cuyahoga County Concerned Citizens ("Public Citizen") hereby oppose the petition for certiorari filed by Nuclear Management and Resources Council, Inc. ("NUMARC").

STATEMENT

1. Following the accident at the Three Mile Island nuclear plant in 1979, a Presidential Commission reported that the lack of adequate training for power-plant operators contributed

significantly to the risks posed by nuclear power-plants. *See* Pet. App. 2a. The industry responded to the accident by creating a program of self-regulation, which focused on improving the training and qualifications of nuclear power-plant personnel.

Congress, however, was not content to trust industry to solve the training problems on its own. Thus, in 1983, Congress enacted § 306 of the Nuclear Waste Policy Act, 42 U.S.C. 10226, which directed the respondent Nuclear Regulatory Commission ("NRC") to "promulgate regulations, or other appropriate Commission regulatory guidance" within 12 months, in order to "establish . . . instructional requirements for civilian nuclear powerplant licensee personnel training programs."

In 1985, the NRC issued a Policy Statement purporting to implement § 306. The Policy Statement announced that, in view of progress being made by the industry's program, the NRC would not engage in rulemaking, but would instead monitor the industry's program for a two-year period and then "revisit the entire training issue . . .." Pet. App. 7a; 52 Fed. Reg. 3124 (February 2, 1987).

Dissatisfied with the NRC's decision to defer to industry for any period of time, respondent Public Citizen petitioned the agency in 1986 to issue binding regulations. When its rulemaking petition went unanswered, Public Citizen filed a petition for mandamus in the United States Court of Appeals for the District of Columbia challenging the NRC's failure to issue binding regulations. Shortly thereafter, the NRC denied Public Citizen's rulemaking petition. The court of appeals then dismissed the lawsuit as having been filed too late to challenge the NRC's 1985 policy statement, but too early to be a petition for review of the denial of Public Citizen's 1986 petition

for rulemaking. *Public Citizen v. NRC*, 845 F.2d 1105 (D.C. Cir. 1988)("*Public Citizen I*").

As promised in its original Policy Statement, the NRC revisited the training issue in 1988. The NRC found that "shortcomings in training are prevalent," SECY-87-121, at 2-3 (May 11, 1987)(J.A. at 69-74), and that "training deficiencies and weaknesses have been identified . . . [in industry] training programs." *Id.* at 4. Nevertheless, the Commission decided to make permanent its policy of deferring to the industry program and not promulgating any requirements on its own. Thus, on November 18, 1988, it again published its Policy Statement, with several refinements. Pet. App. 35a-39a; 53 Fed. Reg. 46603 (1988). From this action, Public Citizen petitioned for review on January 13, 1989, within sixty days of the issuance of the 1988 Policy Statement.

2. The court below first addressed the timeliness of Public Citizen's petition for review, finding that it had been timely filed. The court reasoned that the NRC's 1988 review of its Policy Statement, and its decision to change its temporary policy into a permanent one, constituted a reopening of the issue which made the NRC's 1988 Policy Statement subject to challenge. Pet. App. 4a-12a. Accordingly, because Public Citizen's petition was filed within the 60-day deadline applicable under the Hobbs Act, 28 U.S.C. § 2342(4), and the 180-day time period set forth in the Nuclear Waste Policy Act, 42 U.S.C. § 10139(c), its petition for review was timely, regardless of which provision governed.

The court next addressed the merits of Public Citizen's claim that the Policy Statement conflicted with the mandate of § 306 because it failed to impose enforceable training and qualification requirements. Expressly "[a]pply[ing] the rules laid down in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)," Pet.

App. 13a, the court began its analysis with the language of § 306. It noted that § 306's direction that the NRC "promulgate regulations, or . . . regulatory guidance," did not clearly resolve the question of whether the NRC had to issue enforceable requirements. But the court found that any ambiguity was dispelled by § 306's decree that the regulations or guidance must "establish instructional *requirements* for civilian nuclear powerplant licensee personnel training programs." (emphasis added). This language, the court said, "clearly suggests a mandatory regime." Pet. App. 16a. The court also noted that reading § 306 as imposing a mandatory requirement is in keeping with numerous other statutes, which "instruct an agency to establish requirements, and almost always in the context that makes clear that the requirements must be mandatory." *Id.* Finally, the court found that the legislative history of § 306 supported the conclusion that Congress intended the NRC to establish mandatory requirements for operator training programs. *Id.* at 17a. Having concluded that the NRC's Policy Statement violated § 306 by failing to establish enforceable requirements, the court granted the petition and directed the NRC to issue mandatory requirements for civilian nuclear power-plant licensee personnel training programs. Pet. App. 23a.

3. Both the NRC and NUMARC sought rehearing by the panel, which was denied without dissent. Pet. App. 24a. The NRC and NUMARC also sought rehearing *en banc*, which was also denied without dissent. Judge Williams, joined by Judges Silberman, D.H. Ginsburg, and Sentelle, filed a concurring opinion stating that, although they disagreed with the panel's reading of § 306, the case did not merit *en banc* consideration because "the statute appears unique and, perhaps more important, it seems to me not beyond the reach of agency expertise to devise 'regulations' that preserve most if not all of the flexibility the Commission sought . . .." Pet. App. 26a.

Although Judge Williams had authored *Public Citizen I*, his concurrence did not express any reservations about the panel's ruling on the timeliness question.

REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court for three reasons: *first*, the ruling below will not impede the NRC's ability to implement § 306, *second*, the ruling below is correct, and *third*, the ruling below is not in conflict with any other decision, and will have little, if any, impact on other cases because the language of § 306 appears to be unique to the Nuclear Waste Policy Act.

1. The NRC does not share petitioner's view that this case "presents an issue of fundamental importance to the safety of operations in the nuclear power industry." Pet. at 12. It is the NRC, of course, which is ultimately responsible for overseeing the safety of our nation's civilian nuclear program. But the Commission has not requested certiorari here. While, not surprisingly, the NRC disagrees with the holding below and, for that reason, does not oppose certiorari, it has made the judgment that it can live with the ruling below without an impairment of its regulatory responsibilities. Indeed, the Commission's Brief candidly acknowledges that it fully "expects to follow Judge Williams' suggestion and 'devise "regulations" that preserve most if not all of the flexibility' the Commission sought in its Policy Statement." NRC Brief at 7, *quoting* Pet. App. 26a; *see also id.* at 11. Nor is there even a suggestion in the NRC's brief that this case implicates the safety concerns NUMARC dwells upon in its Petition. Thus, petitioner's policy arguments are, at the least, vastly overstated.

The NRC's admission that it can comply with the court's mandate without sacrificing any of its policy goals is compell-

ed by the limited scope of the relief granted by the court below. That court simply ordered the NRC "to create mandatory requirements for civilian powerplant licensee personnel training programs." Pet. App. 32a. The court did not prescribe the substance of these requirements; that is left to the NRC's discretion. Indeed, nothing in the ruling below forbids the NRC from drawing on NUMARC's expertise in fashioning its requirements, or even adopting the substance of NUMARC's program as its own, so long as it becomes enforceable by the NRC. As Judge Williams pointed out in declining to call for rehearing *en banc*, the panel ruling thus "preserve[s] most if not all of the flexibility the Commission sought . . .." Pet. App. 26a. Because the ruling below will not impede the ability of the NRC to perform its duties under § 306, this case does not warrant this Court's review.

2. In any event, the ruling below properly resolved the two issues in the case. Although petitioner claims that the interpretation of § 306 adopted by the court below disregards the term "regulatory guidance," and violates the rule of deference erected in cases such as *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), both of these assertions miss the mark for the same reason.

The court below expressly and properly concluded that this is a *Chevron* "step one" case because the language of § 306 is unambiguous in its command that the NRC issue mandatory requirements. In reaching its conclusion, the court looked to "the particular language at issue, as well as the language and design of the statute as a whole." Pet. App. 13a, *quoting K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). As the court observed, the introductory phrase in § 306 — which tells the NRC "to promulgate regulations or other appropriate Commission regulatory guidance" — is subject to the directive that such regulations or guidance must "establish . . .

instructional *requirements*." (emphasis added). Pet. App. 16a-17a, 19a-22a. The use of the word "requirements," the court held, clearly indicates a "mandatory regime" and "means something compelled, not merely suggested." Pet. App. 16a. According to the court, this construction of § 306 is in keeping with the statute's overall purpose, as well as clear indications in the legislative history that Congress intended the Commission to issue binding regulations. Pet. App. 16a-18a.

The court's ruling that the word "requirements" compels the NRC to take enforceable action is plainly correct, and is in accord with substantial precedent. *Id.* As the court pointed out, Congress often uses the word requirements in instances where it wishes to make clear that agencies must impose mandatory, enforceable obligations. *Id.* What is more, under the reading of § 306 urged by petitioner and the NRC, the word requirements would be excised altogether from the statute — a result that would be at odds with the fundamental canon of construction cited by the NRC itself (Br. at 8) that, where possible, all statutory language be given effect. In contrast, the assertion advanced by petitioner and the NRC that the ruling below nullifies the word "guidance" is based on a misreading of the court's opinion. Nowhere does the court below forbid the NRC from promulgating "guidance" or "guidelines"; it is free to do so provided that the agency also imposes enforceable requirements for training and qualifications of power-plant personnel.

Nor is there any force to petitioner's arguments concerning the timeliness of Public Citizen's petition for review. Applying well-settled authority to the unusual facts of this case, the court below held that, where an agency reopens a prior rulemaking — here, by deciding to make *permanent* a previously *temporary* policy — challenges to the legality of the agency's action are in order. *See* Pet. App. 5a-9a and authorities

cited therein. Both the petitioner and the NRC take issue with the court's conclusion that the NRC's republication of its Policy Statement in fact entailed a reconsideration of its prior position. But there is no reason why this Court should revisit the court of appeals' resolution of this fact-intensive issue, which is fully supported by numerous NRC statements in the record. Indeed, the court below cites a number of passages in NRC documents establishing that the NRC's 1988 proceeding was intended to be, and was, in fact, a comprehensive reexamination of the choices embodied in the earlier Policy Statement and a decision to transform a temporary, experimental program into a permanent one. Pet. App. 4a-12a. But even if there were room to doubt the soundness of the court of appeals' ruling on this issue, the question of how to properly characterize the NRC's 1988 reopening of its Policy Statement is not one worthy of this Court's consideration.

Equally without merit is petitioner's suggestion, echoed by the NRC, that there is a tension between the panel opinion here and that in *Public Citizen I*. Although both NUMARC and NRC sought rehearing *en banc* on the timeliness issue, Judge Williams did not question the correctness of that aspect of the panel's ruling in his concurrence supporting denial of review *en banc*. Pet. App. 26a. Surely, if there were any force to the argument that the panel's ruling here was in conflict with *Public Citizen I*, Judge Williams — the author of *Public Citizen I* — would have raised it in order to preserve consistency in the court of appeals' jurisprudence. Moreover, even if this argument had merit — which it does not — while "maintaining uniformity" within the Circuit is a principal ground for granting rehearing *en banc*, it is not a reason for this Court to grant review. *Compare* Rule 35(a), Fed.R.App.P. *with* Supreme Court Rule 10. Accordingly, this aspect of the petition also presents no question worthy of this Court's review.

3. Perhaps the most telling flaw in the presentations of petitioner and the NRC on the merits is their failure to come to grips with the uniqueness of this case, which renders it particularly unsuited for review. The main controversy among the parties is the proper construction to be given to § 306. But neither petitioner nor the NRC claims that the ruling below conflicts with any other ruling interpreting § 306. Nor have they taken issue with Judge Williams' observation that the language used in § 306, if not unique, is at least extremely uncommon. Pet. App. 26a. Thus, the question of statutory construction that this Court is urged to resolve will almost certainly not recur. For this reason as well, review should be denied.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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